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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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JAN 26 1998

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act )  
-- Competitive Bidding for Commercial )  
Broadcast and Instructional Television )  
Fixed Service Licenses )

MM Docket No. 97-234

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Reexamination of the Policy )  
Statement on Comparative )  
Broadcast Hearings )

GC Docket No. 92-52

Proposals to Reform the Commission's )  
Comparative Hearing Process to )  
Expedite the Resolution of Cases )

GEN Docket No. 90-264

**COMMENTS OF SOUND BROADCASTING, INC. AND**  
**REGENCY BROADCASTING, INC.**

Sound Broadcasting, Inc. ("SBI") and Regency Broadcasting, Inc. ("Regency"), by their attorneys, and pursuant to Section 1.415 of the Commission's Rules, hereby submit these comments in response to the *Notice of Proposed Rule Making* ("Notice") in the above-referenced proceeding.<sup>1</sup> In the *Notice*, the Commission proposes to use competitive bidding procedures, *i.e.*, auctions, to resolve most mutually exclusive applications for broadcast licenses. SBI and Regency urge the Commission to adopt a "finder's preference" or "petitioner's preference" in an auction for any channel which has been identified by and made available through a successful petition for rule making.

<sup>1</sup> FCC 97-397 (rel. Nov. 26, 1997).

## **I. Introduction**

SBI is an applicant for Channel 233A in Shelton, Washington. On September 6, 1995, SBI filed a petition for rule making to allot Channel 233A to Shelton as its first FM service.<sup>2</sup> SBI commissioned an engineering study demonstrating that the channel could be allotted with a site restriction in compliance with the Commission's minimum distance separation rules, and even though the station would be short-spaced to a proposed allotment of Channel 233C to Vancouver, British Columbia, SBI demonstrated that no potential interference would result. The Commission issued a *Notice of Proposed Rule Making* on October 12, 1995,<sup>3</sup> and after a period for public comment, issued a *Report and Order* on April 23, 1996 allotting the channel as SBI had requested.<sup>4</sup> In a filing window opened on June 7, 1996, SBI and two other parties filed applications for the channel.

Regency is an applicant for Channel 289C3 in San Angelo, Texas. On August 21, 1995, Regency filed a petition for rule making to allot Channel 289C3 to San Angelo as a new FM service. Regency commissioned an engineering study demonstrating that the allotment could be made in compliance with the Commission's minimum spacing rules. The Commission issued a *Notice of Proposed Rule Making* on September 20, 1995,<sup>5</sup> and a *Report and Order* on October 11, 1996.<sup>6</sup> In the subsequent filing window, Regency and eight others applied for the channel.

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<sup>2</sup> Petition for Rule Making, RM-8701, MM Docket No. 95-156 (Sept. 6, 1995).

<sup>3</sup> 10 FCC Rcd 11072 (1995).

<sup>4</sup> *Report and Order*, 11 FCC Rcd 4709 (1996).

<sup>5</sup> 10 FCC Rcd 10391 (1995).

<sup>6</sup> 11 FCC Rcd 12798 (1996).

## **II. Analysis**

The Commission should award a preference in the auction to an applicant, who, like SBI and Regency, had successfully requested the allotment of a new channel through a rule making proceeding. SBI and Regency believe a bidding discount of 50 percent would appropriately reflect the contribution of the successful petitioner to the channel allotment process. That is, if the successful petitioner for a channel ultimately enters the winning bid for that channel, the Commission would require the petitioner to pay 50 percent of its winning bid to claim its construction permit. In order to recognize the successful petitioner from others in the auction, the petition for rule making should be required to identify the petitioner with particularity.

A finder's or petitioner's preference would serve a number of important policy goals. First, it would further the efficient distribution of broadcast stations by encouraging interested parties to perform the sometimes extensive research needed to create a new allotment. In the absence of a finder's preference, a potential applicant would be better off letting someone else spend the money to petition to create a new allotment, and then outbidding the petitioner (whose financial resources would have been depleted) in the ensuing auction. This is the classic "free-rider" problem recognized by economists.<sup>7</sup> It operates to discourage those who would petition for a new allotment from doing so, and results in far fewer than the optimum number of allotments. A finder's preference will solve the problem, and further the efficient distribution of broadcast stations.

Second, a finder's preference could help facilitate the award of licenses to minorities, women, and other designated entities. Congress has directed the Commission to ensure that these classes of applicants are given the opportunity to participate in the provision of spectrum-

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<sup>7</sup> See *generally* Mancur Olson, Jr., *The Logic of Collective Action* (1971).

based services,<sup>8</sup> and the Commission has specifically sought comment on how it may accomplish these goals.<sup>9</sup> The Commission's attention has already been drawn to cases in which minority applicants would have been awarded licenses if a finder's preference had been in place.<sup>10</sup>

Third, a finder's preference is directly related to the use of competitive bidding, which is fundamentally an economic tool for awarding licenses. The Commission has previously considered requests for a finder's preference in connection with its rules for comparative hearings, and has expressed its belief in the merit of such a preference.<sup>11</sup> However, a finder's preference has no clear connection to an applicant's qualifications to hold a broadcast license, which is the basis upon which comparative hearings are founded. Its inappropriateness may have precluded its consideration or eventual adoption in the comparative hearing context. In the auction context, the proposal is even more compelling. A finder's preference has a direct and meaningful connection to an applicant's ability to become the successful bidder in an auction. A primary goal of spectrum auctions is to place each license in the hands of the applicant who values it most.<sup>12</sup> Awarding a finder's preference is an essential step towards meeting that goal.

Finally, a finder's preference would recognize the time and expense which many successful petitioners have already invested in the allotment process and even the playing field with respect to later applicants for the same channels.

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<sup>8</sup> See 47 U.S.C. § 309(j)(3)(B).

<sup>9</sup> Notice at ¶¶ 83-97.

<sup>10</sup> See *Notice of Proposed Rule Making*, GC Docket No. 92-52, 7 FCC Rcd 2664, 2668 (1992), and cases cited therein.

<sup>11</sup> *Id.*

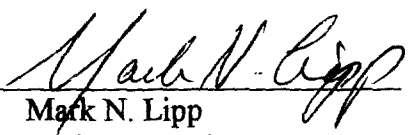
<sup>12</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2349-50 (1994).

**III. Conclusion**

For the foregoing reasons, the Commission should take action consistent with the views expressed herein.

Respectfully submitted,

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